

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: <i>The State v Ndemena Patrick</i>	Case No: Katima Mulilo B84/2021 CR 58/2022
High Court MD Review No: 623/2022	Division of Court: Main Division
Heard before: Judge Usiku <i>et</i> Judge January	Delivered on: 01 July 2022
Neutral citation: <i>S v Patrick</i> (CR 58/2022) [2022] NAHCMD 342 (01 July 2022)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside;2. The accused is convicted of assault with intent to do grievous bodily harm;3. The matter is remitted to the magistrate to sentence the accused afresh, taking into account the portion of the sentence the accused had already served.	
Reasons for order:	

January, J (Usiku J concurring)

[1] This is a review matter submitted from the Katima Mulilo Magistrate's Court in terms of section 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The accused appeared on a charge of attempted murder. The charge alleges that on or about the 06 of April 2021, at or near dairy Compound in the district of Katima Mulilo, the accused did unlawfully assaulted Shakwa Ntwala by hitting her once with a brick on the head and by stabbing her once with a knife on the left arm with intent to murder her.

[3] The accused pleaded guilty and was questioned in terms of section 112(1)(b) of the CPA. The magistrate was not satisfied that the accused admitted all the elements of the offence and entered a plea of not guilty in terms of section 113 of the CPA. The evidence of the complainant was led whereafter the state closed its case. The J88 medical examination report was handed up as an exhibit through the complainant. The J88 reflects a deep 4 cm x 0.5 cm laceration on the right parietal scalp and a 2 cm x 0.5 cm deep laceration on the middle 3rd left forearm posteriorly. The complainant testified that the accused wanted to hurt or injure her.

[4] The accused testified in his defence. He testified that there was an argument about a cigarette that he bought with her coins. The complainant became angry and splashed beer on him. He pushed her whereafter she fell holding the bottle. He stated that is how she sustained the injuries. The magistrate correctly rejected the version of the accused. During questioning in terms of section 112(1)(b) he admitted that he assaulted the complainant with a brick on her head and stabbed her with a knife on the arm.

[5] The accused was convicted as charged. He was sentenced to two years' imprisonment.

[6] A query was directed to the magistrate to explain how the conviction of attempted murder was justified. The magistrate responded that he has reviewed the proceedings and now concedes that the conviction is not justified. He correctly states that he should have convicted the accused of assault with intent to do grievous bodily harm, a competent verdict on a charge of attempted murder.

[7] The accused was questioned during section 112(1)(b) proceedings as to what he wanted to achieve when he assaulted the complainant. He responded that he was angry and that he wanted to discipline her. He admitted having foreseen that by hitting her on the head and stabbing her on the arm that he could kill her. However, when asked if he had the intention to kill her, he answered no. He stated that he foresaw that by assaulting her, she would get injured.

[8] The accused was wrongly convicted for attempted murder and sentenced to two years' direct imprisonment. From the evidence on record, there is no direct evidence that the intention of the accused was an attempt to murder her. Furthermore on the circumstantial evidence, the only reasonable inference is that the accused did not have the intention to murder the complainant. The conviction and sentence therefore needs to be set aside.

[9] In the result:

1. The conviction and sentence are set aside;
2. The accused is convicted of assault with intent to do grievous bodily harm;
3. The matter is remitted to the magistrate to sentence the accused afresh, taking into account the portion of the sentence the accused had already served.

H C JANUARY JUDGE	D D USIKU JUDGE